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No. 00-1457

In the Supreme Court

OF THE

United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,
Petitioner,

VS.

LIONEL SIMON, dba LIBERTY PAPER COMPANY,
Respondent.

On Petition For a Writ of Certiorari to the Court of Appeal of California, Second Appellate District, Division Four

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In support of its Petition for a Writ of Certiorari (the "Petition"), Petitioner SAN PAOLO U.S. HOLDING COMPANY, INC. ("SAN PAOLO"), hereby responds to the Brief in Opposition (the "Opposition Brief") filed by Respondent LIONEL SIMON, dba LIBERTY PAPER COMPANY ("SIMON")[1], as follows:

INTRODUCTION

In the Petition, SAN PAOLO presents three questions for this Court's review, as follows:

(i) Whether an award of punitive damages which is 340 times greater than the attendant award of compensatory damages ($1,700,000.00; $5,000.00) is violative of a defendant's right to due process under the Fourteenth Amendment to the United States Constitution, especially where the conduct involves a single commercial transaction and the harm suffered is purely economic;

(ii) Whether the standard of review on a challenge to the constitutionality of a punitive damage award is (a) "independent and de novo," or (b) only an "abuse of discretion"; and

(iii) In determining the reasonableness of the relationship between an award of punitive damages and the plaintiff's actual harm, whether it is proper to consider claims for compensatory damages which have previously been rejected.

In his Opposition Brief, SIMON misses the entire focus of the Petition by failing to address these critical issues of nationwide importance. Instead, SIMON devotes virtually one half of the Opposition Brief to an inflammatory and

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[1] While, according to this Court's Docket, SIMON filed his Opposition Brief on April 19, 2001, it was served such that it was not received by counsel for SAN PAOLO until four days later, on April 23, 2001.

inaccurate description of the facts of this case. The Petition, in contrast, is not based upon the facts of this case, but rather substantial questions of law of paramount public interest and concerns which have not yet been addressed by this Court. SIMON, however, focuses on his own interpretation of the facts in an attempt to divert this Court's attention from issues of wide-ranging importance to all civil litigants and courts throughout the Nation.

ARGUMENT

In the Opposition Brief, SIMON fails to address the merits of the issues raised in the Petition and instead relies on various boilerplate, conclusory arguments in an effort to dilute these important issues. For example, SIMON asserts that the Opinion of the California Court of Appeal is "unpublished." This fact only highlights the urgent need for guidance from this Court regarding the standard of appellate review of the constitutional excessiveness of punitive damage awards. Beyond the plethora of published decisions addressed in the Petition, there are undoubtedly even more decisions regularly issued by various state courts throughout this land on this issue, all applying conflicting deferential standards of review when analyzing issues of constitutional significance. Moreover, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, United States Supreme Court Case No. 99-2035 *("Cooper Industries")*, the question presented and ultimately accepted by this Court for review was encompassed in the unpublished portion of that case.[2]

SIMON summarily dismisses the issues of federal constitutional concern raised in the Petition, claiming that this appeal is "unremarkable" and involves (as does every case)

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[2]This case was argued before this Court on February 26, 2001, and remains pending.

"a fact specific determination." (See Opposition Brief, pp. 25-26.) SIMON also fails to address in any way the authorities discussed by SAN PAOLO. These authorities illustrate the problems presented by the use of divergent appellate standards of review by state courts throughout this country when conducting a constitutional inquiry into claims of grossly excessive punitive damage awards. (See Petition, pp. 11-19.)

SIMON further fails to dispute the fact that the Petition raises an issue under the Fourteenth Amendment of the United States Constitution which is strikingly similar to the issue under the Due Process Clause of the Fifth Amendment currently under consideration in *Cooper Industries:* whether the standard of review of a federal trial court's ruling on a challenge to the constitutionality of a punitive damage award is abuse of discretion or de novo. In both *Cooper Industries* and the case at bench, the appellate court applied a deferential standard of review in determining that the trial court had not abused its discretion in refusing to reduce a punitive damage award. By accepting the Petition filed by *Cooper Industries,* this Court acknowledged the nationwide significance of this issue, which SIMON simply cannot dispute.

SIMON attempts to avoid the fact that the California Court of Appeal used a substantial evidence (deferential) standard of review and not the de novo standard clearly requested by SAN PAOLO in its Opening Brief by repeatedly claiming (without any support) that the Court of Appeal upheld the judgment after it had reviewed "the entire record." (App.[3], A-31, A-35-A-36; Appellant's Opening Brief, p. 14; Opposition Brief, pp. 2, 15, 18.) SIMON'S repeated incantation, however, only begs the question: according to what standard was all or any portion of the record

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[3]"App." refers to the Appendix to the Petition.

reviewed? Further, the Court of Appeal's own language contradicts SIMON'S argument.

Indeed, *the Court of Appeal itself acknowledged its deference* to the findings of the jury, advising that its review "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusions reached by the jury." (App., A-31, A-35-A-36.) SIMON also fails to acknowledge that the Court of Appeal deferentially reviewed all of the evidence "in the light most favorable to Simon, as the prevailing party," gave "Simon the benefit of every reasonable inference," and resolved "conflicts in support of the verdict." (App., A-19-A-20.) In the Opposition Brief, SIMON fails to confront the fact that the Court of Appeal flatly refused to engage in an independent, de novo review of the constitutionality of the excessive award of punitive damages herein.

SIMON also attempts to divert this Court's attention by repeatedly speculating that the *trial court* must have engaged in a de novo review of the jury's award, because such review is required on a motion for new trial under California Code of Civil Procedure section 657. The question presented to this Court is not the standard which may or may not be employed by trial courts when reviewing the propriety of punitive damages awards but, instead, is the standard to be applied by appellate courts when reviewing trial court rulings on constitutional challenges to excessive punitive damage awards. SIMON'S attempt to so shift the focus of the Petition is to no avail.

Moreover, the truth is that no such standard is set forth in this statute. Instead, Section 657 provides a highly deferential standard, as follows:

> A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or

> other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.
>
> (Cal. Code Civ. Proc., § 657.)[4]

In ruling upon SAN PAOLO'S Motion for New Trial, or Alternatively for Remittitur of Excessive Damages, following the second jury trial (limited to the amount of punitive damages to be awarded)[5] the trial court afforded SAN PAOLO only perfunctory treatment of its challenge to the excessiveness of the award under the standards set forth in *BMW of North America v. Gore,* 517 U.S. 559 (1998) and *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, finding that an award of punitive damages "boils down to about the same sort of analysis that the jury gives to emotional distress damages. It's not done with any particular precision. And the cases have not required that it be done with particular precision." (App. Vol. VII, pp. 1826-1828; R.T., p. 1997, l. 12 - p. 1998. l. 12.) Accordingly, the trial court patently did not apply any standard even approaching "independent" or "de novo" in reviewing the constitutionality of the punitive damages award.

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[4]Notably, a trial court's order on a motion for a new trial is reviewed only for "manifest and unmistakable abuse of discretion." *Miller v. National American Life Ins. Co.,* 54 Cal.App.3d 331, 345 (1976). A true and correct copy of California Code of Civil Procedure section 657 is appended hereto for this Court's reference. (Reply App., *infra,* A-1.)

[5]SIMON glosses over the fact that SAN PAOLO prevailed on its first Motion for New Trial following the punitive damage award of $2.5 million by the first jury, which the trial court remitted to $250,000.00. The second jury trial on the limited issue of the amount of punitive damages to be awarded to SIMON was necessitated by his rejection of the trial court's remittitur.

In his Opposition Brief, SIMON employs a novel interpretation of *BMW*. This case is universally cited for the proposition that punitive damages must bear some reasonable relationship to the actual harm suffered. See, e.g., *Continental Trend Resources v. OXY USA,* 101 F.3d 634, 639 (10th Cir. 1996); *Ace v. Aetna Life Ins. Co.* 139 F.3d 1241, 1248-1249 (9th Cir. 1998), *cert. denied,* 525 U.S. 930 (1998). In contrast, SIMON cites *BMW* for the proposition that large punitive damage awards can be made in virtually all circumstances. (Opposition Brief, pp. 19-20.) This assertion is legally incorrect.

SIMON also discusses his expert, David M. Rosenthal, who testified that SIMON had suffered a loss of profit of $400,000.00 due to his inability to purchase the subject office building. (Opposition Brief, pp. 11, 18, 19.) SIMON fails to address the fact that the first jury expressly rejected this claim and refused to award any damages associated therewith, including this alleged lost benefit of the bargain. It is this rejection which is the focus of the third question presented by SAN PAOLO'S Petition: whether this "loss" can be considered in calculating an award of punitive damages when the prior factfinder has determined that no such loss occurred.

CONCLUSION

In light of SIMON'S inability to squarely face the questions presented by the Petition and the amply supported reasons submitted by SAN PAOLO for granting the Petition, SAN PAOLO respectfully requests that this Honorable Court grant its Petition for a Writ of Certiorari to provide litigants with guidance on these sharply focused issues of nationwide interest and application.

At a minimum, SAN PAOLO respectfully requests that this Honorable Court defer consideration of the Petition pending the announcement of its decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, Case No. 99-2035. Should this Court reverse the (unpublished) decision of the United States Court of Appeals for the Ninth Circuit in that case, SAN PAOLO respectfully requests that the Court summarily grant certiorari herein, reverse the judgment of the California Court of Appeal, Second Appellate District, Division Four, and remand the case for reconsideration in light of the standards set forth in its forthcoming decision.

Date: May 10, 2001 Respectfully submitted,

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APPENDIX A-1

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 657

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive or inadequate damages.

6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.

The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons

specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.